SUPREME COURT, U. S.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1970

No. 1105

MORRIS MALINSKY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER 1970 TERM

MORRIS MALINSKY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner MORRIS MALINSKY petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered September 21, 1970 (Docket No. 34763).

The judgment affirmed the order and opinion of the District Court, denying his application for a writ of coram nobis (18 U.S.C. 1651a) to vacate judgment of conviction entered upon his plea of guilty. See Appendix A.

Opinions Below

The Court of Appeals did not write an opinion, but affirmed in open court upon the opinion of the District Court.

The opinion of the District Court (S.D.N.Y. No. 70 Civil 230) is reported at 310 F. Supp. 523. See Appendix B.

Jurisdiction

The jurisdiction of this Court to review the judgment-order of the Court of Appeals is granted pursuant to 28 U.S.C. 1254 (1).

Issue Presented

May a federal district court enter a judgment upon a plea of guilty accompanied by a contemporaneous denial of acts constituting the crime?

Statutory and Constitutional Provisions Involved

The all writs statute, 28 U.S.C. 1651(a), providing for a writ of coram nobis, to one who has completed serving his federal sentence, is involved, but not in dispute.

The due process clause of the Fifth Amendment to the United States Constitution is well known to this Court.

Preliminary Statement

In June 1956, petitioner and eleven co-defendants were indicted on a four-count indictment charging three counts of obstruction of interstate commerce by extortion (18 U.S.C. 1951) and one count of conspiracy to so obstruct (18 U.S.C. 371). S.D.N.Y. No. 150-198.

The first and second trial resulted in a mistrial.

At the commencement of the third trial, petitioner, along with eight co-defendants, pleaded guilty to count one — the conspiracy count.

Subsequently, on May 15, 1957, the District Court imposed a three-year sentence, which has long since been served.

In February 1970 petitioner applied to the District Court to vacate the plea of guilty and the judgment on the ground that the plea of guilty was improperly given and accepted. After examining all the relevant court transcripts, and, after studying the briefs (but without an evidentiary hearing), the District Court denied the application in a reported opinion (310 F. Supp. 523).

On that opinion the Court of Appeals affirmed.

At the time of the taking of the plea, the District Court did not question the petitioner as to the factual basis of the plea. Instead, a hearing was scheduled to allow for full statements by both the defense and the prosecution.

At the hearing the petitioner testified at great length. Repeatedly he denied his guilt of the charge. He denied use of violence or extortion; he denied receiving any money; he denied forging any checks; he denied having anything to do with the transactions. At no time did he concede any wrongdoing.

During the hearing the petitioner stated:

> "I never threatened anybody. I never extorted anything from anybody. The only moneys I ever received they were only

moneys that I received in salary; nobody outside of my salary ever gave me five cents in the whole association or any surrounding around it" (A10).[1]

• • •

"As far as the Association is concerned, Your Honor, at no time did I ever take this job to do any violence or to extort anything from anybody" (A12).

• • •

"I don't have anything to do here with any threats, violence or whatever they want to put into this here thing. I was in here to do a job and nothing else. I suffered on enough occasions. I never wanted to be a hoodlum. I did not come on this thing to be a hoodlum, I never intended to be a hoodlum and if anybody wants to paint that picture of me, I can't help it because it is only my past. I tell you that sincerely" (A15-16).

• • •

"I definitely deny having anything to do with that" (A21).

The District Court accepted the plea of guilty and several weeks later imposed sentence without any further statement from the petitioner.

In its opinion denying the coram nobis application, the District Court wrote (310 F. Supp. 523):

"A reading of the record reveals the speciousness of the contention. Petitioner was represented by his trial counsel, an experienced

[1] Appendix to brief in Court of Appeals.

lawyer in the field of criminal law for almost 50 years. Petitioner himself was not without prior substantial criminal experience. At the hearing, representations by the Assistant United States Attorney, which JUDGE HERLANDS was meticulous to assure was supported by prior trial testimony, Grand Jury testimony and documents in the government's file, indicated that typical case of labor-management racketeering and strong-arm tactics."

* * *

"JUDGE HERLANDS, with painstaking thoroughness, afforded both petitioner and his counsel an opportunity to make explanations in reply to the prosecutor's contentions and to offer mitigating factors for alleged wrongful conduct, or to put such conduct in its proper perspective. In effect, petitioner was accorded the right of allocution even before the date of sentence. Petitioner, in free willing explanations, sought to minimize his role in the conspiracy."

* * *

"* * * However, petitioner's self-service statements or his counsel's purported explanation of the crime, aimed to minimize petitioner's role in the conspiracy, and to secure leniency from the sentencing Court, must be viewed against the totality of the hearing record and the purpose of petitioner's statements. So viewed, the record abundantly establishes incident upon incident supporting the conspiracy charge to which the petitioner and the co-defendants pleaded guilty, and the petitioner's dominant role therein."

"Petitioner did not deny his role as a

conspirator. His denials at the hearing related to specific acts charged to other co-conspirators; petitioner conveniently disregards that such act in furtherance of a common enterprise were also chargeable to him as an admitted member of the conspiracy. The record abundantly established that there was a factual basis for petitioner's guilty plea, that he voluntarily acknowledged his guilt with intelligent understanding of the nature of the charge and the consequences of the plea; and that the plea was entered when he was represented by exceptionally experienced competent counsel."

Reasons for Granting the Writ

In recent years this Court has sought to clarify the applicable rules with respect to the trial court's acceptance of a guilty plea from a defendant in a criminal proceeding. United States v. Jackson, 390 U.S. 570 (1968); McCarthy v. United States, 394 U.S. 459 (1969); Boykin v. Alabama, 395 U.S. 238 (1969); Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

Just last month, in North Carolina v. Alford, No. 14, October Term 1970 398 U.S. ___ (1970), 39 U.S. Law Week 4001, this Court confronted the issue of whether the due process clause of the Fourteenth Amendment forecloses a state criminal court from accepting a plea of guilty from a criminal defendant who is willing to waive his right to trial, but who refuses to concede his guilt. In vacating the Court of Appeals' issuance of a federal habeas corpus writ to a state inmate,

this Court held that Alford's plea of guilty was not invalid "because it was made to avoid the possibility of the death penalty" (slip opinion, page 13). Furthermore the United States Constitution, and its Fourteenth Amendment, does not restrict the state criminal courts in the administration of its own system of criminal justice from accepting a plea of guilty from an accused who is "unwilling or unable to admit his participation in the acts constituting the crime." It "is not a constitutional requisite to the imposition of criminal penalty." (Slip opinion, page 11.) The state courts have certain leeways, free from constitutional or federal court restrictions. See footnote 12, at page 11-12 of the slip opinion — " * * * Likewise the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence."

The Alford opinion leaves open the question of whether a defense admission of guilt is a necessary requisite in the federal district court. Footnote 1 of the dissenting opinion notes that several of the Courts of Appeal have expressed varying opinions on this question. The Third Circuit (U.S.A. ex rel. Crosby v. Brierly, 404 F.2d 790, 801-802), the Fourth Circuit (Bailey v. MacDougall, 392 F.2d 155, 158, n.7), and the Fifth Circuit (Hulsey v. United States, 369, F.2d 284, 287) have held that due process does not permit the entry of a judgment upon a plea of guilty accompanied by a contemporaneous denial of acts constituting the crime. On the other hand, the District of Columbia Circuit (McCoy v. United States, 363 F.2d 306, 308-309; Bruce v. United States, 379 F.2d 113, 119 n. 17; Griffin v. United States, 405 F.2d 1378, 1379-1380), the Ninth

Circuit (Maxwell v. United States, 378 F.2d 735, 739, n.3), and now the Second Circuit (in our case) take the opposite point of view.

The majority opinion in Alford in no way noted the conflicting views of the federal appellate courts, or sought to resolve the differences among the circuits. This Court limited itself to the state criminal system, and the role of a federal habeas corpus court in constitutionally policing the state court.

It is in order for this Court to resolve this fundamental, unanswered question — may a federal district court enter a judgment upon a plea of guilty accompanied by a contemporaneous denial of acts constituting the crime. In this regard the Court can either apply the due process clause of the Fifth Amendment — or exercise its supervisory powers over the federal courts system, and its administration of criminal justice.

While recognizing the great ingenuity of incarcerated defendants (and defense counsel), it would appear that at the moment this issue appears to be the last of the unanswered questions as the Court completes its full-scale pronouncement of guide lines and rules as to the acceptance of guilty pleas. As pleas of guilty constitute by far the principal mode of disposition of criminal cases in the federal court, the resolution of this issue is important for the proper termination of countless cases.

Conclusion

The petition should be granted.

Respectfully submitted,

H. ELLIOT WALES
Counsel for Petitioner Malinsky
299 Broadway
New York, N.Y. 10007

December, 1970.

Appendix A

Order from United States Court of Appeals

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of September, one thousand nine hundred and seventy.

Present: HON. J. EDWARD LUMBARD,
Chief Judge

HON. ROBERT P. ANDERSON,

HON. WILFRED FEINBERG,

Circuit Judges.

- -x

United States of America, :

Plaintiff-Appellee, :

v. :

Morris Malinsky, :

Defendant-Appellant. :

- -x

Appeal from the United States District Court for the Southern District of New York.

Order from United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

Appendix B

Opinion

EDWARD WEINFELD, D.J.

This is a motion pursuant to Section 2255 of Title 28 to vacate a judgment of conviction entered May 15, 1957, upon petitioner's plea of guilty while represented by counsel. He was sentenced to a term of imprisonment for three years. The motion is made thirteen years after the plea was entered before the late Judge William B. Herlands, eight months after he passed away, and eleven years after the sentence was served. Since petitioner has completed his sentence, the application is treated as one in the nature of a writ of coram nobis,[1] an extraordinary remedy to be applied only under the most compelling circumstances to correct errors "of the most fundamental character."[2] The record in this matter demonstrates beyond peradventure not only the absence of any such egregious error, but the speciousness of the application.

Petitioner was indicted together with eleven other defendants in a four-count indictment. The first count charged a conspiracy to obstruct interstate commerce in the pickle industry through extortion. The remaining three counts charged the substantive crime of extortion under the Hobbs Act.[3] Petitioner was named in the first three counts. Two trials, one before Judge Murphy and the other before Judge Herlands, resulted in mistrials. After a jury had been empanelled for a third trial, petitioner and eight others offered to

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1. 28 U.S.C. § 1651(a) (1964).
2. United States v. Morgan, 346 U.S. 502, 511-12 (1954).
3. 18 U.S.C. § 1951 (1964).

withdraw their previous pleas of not guilty and to plead guilty to the conspiracy count. After inquiry by Judge Herlands as to the voluntariness of petitioner's proffered plea, it was accepted on April 5, 1957, and a date set for sentence. However, on April 9, before sentencing, an extensive hearing was conducted by Judge Herlands at which the factual basis of the plea was explored in great detail. Another purpose of this presentence hearing, also accorded to petitioner's co-defendants, was to ascertain the degree of culpability of each in order to aid the court in evaluating a fair and just sentence.[4] Statements made by petitioner during his hearing, the transcript of which runs almost 100 pages,[5] form the basis of the present application.

The gist of petitioner's claim is that at that hearing he denied his guilt; the use of violence, threats or extortion; that consequently the plea of guilty entered four days earlier was not a valid plea, and accordingly he is entitled to have it vacated. A reading of the record reveals the speciousness of the contention. Petitioner was represented by his trial counsel, an experienced lawyer in the field of criminal law for almost fifty years. Petitioner himself was not without prior substantial criminal experience. At the hearing, representations by the Assistant United States Attorney, which Judge Herlands was meticulous to assure were supported by prior trial testimony, grand jury testimony and documents

4. Minutes of Plea, April 5, 1957, at 16; Minutes of Presentence Hearings, April 8-12, 1957, at 1-2; Minutes of Sentencing, May 15, 1957, at 33, 57, 60. A number of defendants had themselves requested the hearings.

5. In all, more than 700 pages of testimony were taken at these presentence hearings.

in the government's file, indicated a typical case of labor-management racketeering and strong-arm tactics. It was a sordid picture of intimidation of employers and betrayal of employees. Petitioner had been business manager of the New York Pickle and Condiment Dealers Association, purporting to represent a group of pickle peddlers. The Association, in conjunction with two bogus unions, put pressure upon and extorted money from pickle wholesalers by threats of picketing, price-cutting, assaults and destruction of property. "Sweetheart" contracts were granted to certain employers at the expense of employees, who received no benefits but were saddled with increased union dues, which in turn were siphoned off under the guise of salaries to petitioner and others. Available evidence gave strong support to the prosecutor's contention that petitioner was a, if not the, leading culprit in the illegal conspiracy. Judge Herlands, with painstaking thoroughness, afforded both petitioner and his counsel an opportunity to make explanations in reply to the prosecutor's contentions and to offer mitigating factors for alleged wrongful conduct, or to put such conduct in its proper perspective.[6] In effect, petitioner was accorded the right of allocation even before the date of sentence. Petitioner, in free-wheeling explanations, sought to minimize his role in the conspiracy. His counsel also sought to play down the numerous incidents of illegal conduct attributed to petitioner, stating (somewhat naively, in view of the indictment charge): "[A]ll you have here is a technical violation of the Sherman Antitrust Law with the conspiracy to interfere with probably some business enter-

6. Sentencing minutes, at 85.

prises."[7] At another point he stated petitioner "has pleaded guilty to the conspiracy count, because the union was interwoven with the Association. Now, if you didn't have that we would not be here at all."[8] However, petitioner's self-serving statements or his counsel's purported explanation of the crime, aimed to minimize petitioner's role in the conspiracy and to secure leniency from the sentencing court, must be viewed against the totality of the hearing record and the purpose of petitioner's statements. So viewed, the record abundantly establishes incident upon incident supporting the conspiracy charge to which petitioner and the co-defendants pleaded guilty, and petitioner's dominant role therein.[9]

Petitioner did not deny his role as a conspirator. His denials at the hearing related to specific acts charged to other co-conspirators; petitioner conveniently disregards that such acts in furtherance of the common enterprise were also chargeable to him as an admitted member of the conspiracy. The record abundantly establishes that there was a factual basis for petitioner's guilty plea; that he voluntarily acknowledged his guilt with intelligent understanding of the nature of the charge and

7. Hearing Minutes, at 327.
8. Hearing Minutes, at 310.
9. The prosecutor's view that petitioner was the most culpable of the defendants was expressed at the hearing and repeated at the time of sentencing in the presence of petitioner. After sentence petitioner moved, under § 2255 of Title 28 to vacate his 3-year sentence upon the ground that at the presentence hearing a co-defendant in his absence had also expressed the view that he was the most culpable and that the court was influenced by it in imposing sentence; petitioner further contended that the court, in conducting the presentence hearing, had deprived him of the benefit of the services of the probation department. The motion was denied as frivolous, as indeed it was.

the consequences of the plea; and that the plea was entered when he was represented by exceptionally experienced and competent counsel.[10] The entry of the plea was a deliberate, reasoned decision by petitioner. To avoid the guilty plea upon his record would not serve the cause of justice but would make a mockery of the courts.

The motion is denied.

Dated: New York, N.Y.
March 5, 1970

s/ Edward Weinfeld
United States District Judge

10. Cf. Kercheval v. United States, 274 U.S. 220, 223-24 (1927).

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1105

MORRIS MALINSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted in 1956 in the United States District Court for the Southern District of New York of conspiracy to obstruct interstate commerce by extortion and three substantive counts charging such obstruction. 18 U.S.C. 371, 1951. At the commencement of the third trial in 1957 (two earlier trials had resulted in mistrials), petitioner and eight co-defendants, represented by experienced counsel, entered pleas of guilty to the conspiracy

count. Before imposing sentence, the trial judge held an extensive hearing at which the factual basis of the plea was explored in great detail. Petitioner was thereafter sentenced to three years' imprisonment, service of which he long ago completed.

In 1970 petitioner instituted the present action, treated by the district court as a petition for a writ of error coram nobis. He claimed that certain statements he made at the pre-sentence hearing amounted to a denial of his guilt. The district court denied the petition in a thorough opinion (Pet. 3a-7a). It found that at the pre-sentence hearing petitioner did not deny his role as a conspirator; that his denials related to "specific acts charged to other co-conspirators"; and that his apparent purpose was to obtain leniency from the sentencing court (Pet. 5a-6a). The court further pointed out that the "[a]vailable evidence gave strong support to the prosecutor's contention that petitioner was a, if not the, leading culprit in the illegal conspiracy," which involved a plan to extort money from pickle wholesalers by threats of picketing, price cutting and assaults (Pet. 5a). The court of appeals affirmed without opinion (Pet. 1a-2a).

Petitioner contends that this case provides an appropriate vehicle to explore the impact of this Court's recent guilty plea decision in *North Carolina* v. *Alford*, No. 14, this Term, decided November 23, 1970. But this case raises no new question. As the district court found, petitioner's statements at the pre-sentence hearing were not protestations of innocence, but amounted to attempts to gain a lenient

sentence. Moreover, the *Alford* opinion suggests (slip op., pp. 6-13) that where, as here, a factual basis for guilt is shown, a defendant's guilty plea may be accepted despite denials of guilt.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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